

*Fulton County Daily Report*, Tuesday, March 23, 2010

### **Court kills caps on med-mal awards**

*Justices rule unanimously that right to jury trial trumps limits on pain and suffering awards.*

By Alyson M. Palmer, Staff Reporter

By a 7-0 vote, the Supreme Court of Georgia on Monday struck down the state's caps on pain and suffering damages in medical malpractice cases.

"The very existence of the caps, in any amount, is violative of the right to trial by jury," Chief Justice Carol W. Hunstein wrote in her opinion for the court.

The ruling was the climax of the legal fights over the 2005 tort reform package. Although the court's response to various aspects of the package had been mixed, the caps, which generally limit non-economic damages to \$350,000 in a case against a single medical malpractice defendant, were the most controversial part of Senate Bill 3.

The decision also had elements of political intrigue. Hunstein's 2006 re-election was challenged by big spending through a group whose explicit goal was to preserve the 2005 tort reform package. And Justices Harold D. Melton and David E. Nahmias, the two high court appointees of tort-reform backer Gov. Sonny Perdue, went along with the core of Monday's decision without voicing any equivocation.

The Medical Association of Georgia issued a statement by its president, Gary C. Richter, decrying the decision as a loss for patients concerned about physician availability and saying the group was examining its legislative options. At least two Republican candidates for governor, Eric Johnson and Nathan Deal, vowed to continue to work for tort reform measures, although lawyers watching the case said the Legislature would have to pass a constitutional amendment to undo the court's work. (See related story, page 1.)

Atlanta lawyer R. Adams "Adam" Malone of Malone Law, who represents the plaintiffs in Monday's case, expressed gratitude for the unanimous nature of the ruling. "I'm just a true believer in the principle that the right of we the people to self-govern is completely dependent on our ability to speak at the ballot box and in the jury box," said Malone, "and if the government invades either one of them, then we no longer have the distinction that separates our great democracy from the rest of the world."

The case stemmed from plastic surgery that the plaintiff, Betty Nestlehutt, claimed left her disfigured, with the blood supply to her face destroyed. Nestlehutt took her case to a Fulton County jury, which in September 2008 awarded \$115,000 for medical expenses, \$900,000 for Nestlehutt's pain and suffering, diminished earning capacity and loss of enjoyment of life, and \$250,000 for the loss of consortium experienced by Nestlehutt's husband.

Defendant Atlanta Oculoplastic Surgery, the practice of plastic surgeon Harvey P. "Chip" Cole, argued to Fulton State Court Judge Diane E. Bessen that SB 3 required the Nestlehutts' damages be reduced to \$465,000—\$115,000 for medical expenses and \$350,000 for all non-economic damages. Bessen responded by declaring the caps unconstitutional.

Bessen said the caps violated the Georgia Constitution's guarantees of a right to trial by jury and to equal protection under the law. She wrote that they also infringed upon the separation of powers by interfering with the trial judge's usual role of forcing plaintiffs to choose between a reduced award and a new trial when a jury verdict is deemed too high.

September arguments in the case focused on the right to a jury trial, and Monday's ruling was confined to that point. Representing the surgeon's medical practice, Jonathan C. Peters of

Atlanta's Peters & Monyak argued last fall that the right to trial by jury is about whether a jury, rather than a judge, should decide certain matters—not whether lawmakers can put a limit on certain types of damages.

Michael B. Terry of Atlanta's Bondurant, Mixson & Elmore, appearing for the Nestlehtutts, countered that if the caps were allowed to stand, neither the evidence nor the jury's findings would matter to the final non-economic damages recovery, and the exclusive province of judges to review verdicts for consistency would be infringed.

In her opinion for the court, Hunstein said late 18th century English common law, adopted by the state Legislature as the law of the state prior to the adoption of the 1798 state Constitution, was key to determining whether the state constitutional provision guaranteeing the right to trial by jury was meant to include damages in medical malpractice cases. "Given the clear existence of medical negligence claims as of the adoption of the Georgia Constitution of 1798," wrote Hunstein, "we have no difficulty concluding that such claims are encompassed within the right to jury trial."

She wrote that the caps violated that right because they require a trial court essentially nullify a jury's findings of fact on damages. Although the state Supreme Court in 1979 and 1993 allowed statutory limits on punitive damages, Hunstein wrote that punitives were different because the measure of punitive damages suffered is not really a fact determined by a jury. She also dismissed those decisions as including only a "cursory analysis" of the jury trial right issue.

Peters, the defense lawyer who argued the case, said he didn't find the result surprising, although he wouldn't have been surprised by a split decision. "Given the questions I was asked at oral argument and some of the decisions from other jurisdictions, other states, I was not surprised that the court threw the caps out," said Peters, noting that there are decisions going both ways on the issue nationally.

Terry, who made the winning argument, said his research showed that the single biggest predictor of how a state's court had ruled on the issue in the case was the way the right to trial by jury was written in that state's constitution. Georgia's constitution says "[t]he right to trial by jury shall remain inviolate."

Courts in states with constitutional language similar to Georgia's had largely ruled against caps, Terry said.

"There are two or three states that have similar right to jury trial that have come to different conclusions," Terry allowed, but he said those states' courts had employed a logic the Georgia high court had found unpersuasive: Because the jury had been allowed to issue a verdict, the right was not infringed.

Hunstein's opinion did not address whether the Legislature's tort reform efforts made sense or had accomplished their goals, an issue on which debate continues.

The Medical Association of Georgia statement said there are about 1,000 more physicians in Georgia since the tort reform law passed in 2005, according to a study of private practice physicians in the state by the Carl Vinson Institute of Government at the University of Georgia. MAG's president also pointed to statistics from MAG Mutual Insurance Co. to the effect that medical liability insurance costs are down by 18 percent in the state since 2005 and that MAG Mutual's premiums have not increased since 2005.

Malone, the Nestlehtutts' lawyer, countered that according to the Medical Liability Monitor, doctors in Georgia experienced a 150 percent increase in premiums in the four years leading up to SB 3 without a corresponding increase in claims. Since then, he said, the state's doctors have, at most,

seen only a 7 percent reduction in their premiums. At the same time, he said, MAG Mutual has reported quadrupled net income.

Moreover, said Malone, the rate of medical errors has not decreased since 2005. "All lawyers want to work together with our legislators and public servants to find real solutions to real problems," said Malone. "Let's just take the politics out of this."

The unanimity of Monday's ruling was striking, especially given that it included Perdue's two appointments to the high court, Melton and Nahmias. Perdue signed SB 3 into law after the Republican leadership made a major push on getting tort reform passed. Melton was Perdue's executive counsel when the governor signed the legislation, although in electing to participate in most of the SB 3 decisions handled by the court, Melton has said he had very little to do with the bill.

Nahmias authored a concurring opinion about how the court should decide whether to apply its decisions retroactively. But he was unequivocal on the key jury trial right issue in the case. "The General Assembly has broad authority to address the many vexing issues related to health care costs and the availability of health care providers," wrote Nahmias, "but the Legislature's discretion is bounded by the fundamental rights enshrined in our Constitution."

Atlanta lawyer J. Marcus "Marc" Howard, the co-chairman of the Georgia Trial Lawyers Association's amicus committee and a member of Nahmias' campaign committee, said the unanimity of the decision showed that the court was ruling based on the constitution, not politics. "And I think that is a very positive thing, because it means we don't have a political court," said Howard, who noted GTLA hadn't filed an amicus brief in the case. "The court is ruling on the basis of how it interprets the law, and not who they are trying to curry favor with."

Atlanta lawyer Thomas S. Carlock of Carlock, Copeland & Stair, a member of the defense team in Monday's case, didn't quarrel with that. "I think they did what they thought was right," said Carlock. "I'm just not one of those who buys into our Supreme Court ruling on something based on being re-elected."

Notwithstanding Nahmias' concurring opinion, the justices appeared to all agree that the decision should apply to all pending cases, not just those to be filed in the future, although Melton's decision to join neither the portion of Hunstein's opinion that addressed retroactivity nor Nahmias' concurrence made his views on retroactivity—and that of an apparently split court—unclear.

Hunstein's opinion, joined in its entirety by Justices Robert Benham and Hugh P. Thompson, said that under a three-factor test, the decision should be applied retroactively because, among other reasons, the constitutionality of the caps had been in doubt.

In his concurrence, joined by Presiding Justice George H. Carley and Justice P. Harris Hines, Nahmias wrote that he thought the three-factor test was inappropriate and a decision invalidating a statute as unconstitutional should always be applied to pending cases.

The case was Atlanta Oculoplastic Surgery v. Nestlehutt, No. S09A1432.

Tuesday, March 23, 2010

## **Legislators are left with few options**

*Overturning court's decision would require a constitutional amendment.*

By Andy Peters, Staff Reporter

Don't expect the Legislature to try to respond this year to the Georgia Supreme Court's decision to throw out caps on pain and suffering damages in medical-malpractice cases.

Undoing the court's unanimous ruling probably would require the General Assembly to amend the state Constitution, according to three Republican state senators and two litigators in private practice. That's because the court used broad language in saying that caps violated the state Constitution's right to trial by jury.

A constitutional amendment requires the approval of two-thirds of the House and Senate. The legislation that made the damage caps law in 2005—Senate Bill 3—required only a simple majority of both chambers.

Monday, the day the Supreme Court's opinion was issued, was the last day that a new bill could be passed out of committee for approval in this year's session, according to Sen. Preston W. Smith, R-Rome, chairman of the Senate Judiciary Committee. And both the Senate and House are extremely busy this week with issues related to the budget, transportation and other matters, he said.

"That doesn't leave us with any reasonable options to work with right now," Smith said.

It wouldn't be impossible for the Legislature to approve a constitutional amendment this year, according to veteran state Capitol lobbyist Neill Herring. If lawmakers could find legislation that proposes to amend the state Constitution and that deals with the same section of the Georgia Code as the tort law, they could use that as a vehicle for a response to the court, said Herring, who lobbies for the Sierra Club and isn't lobbying on any tort-related issues. Such a vehicle would need to already have passed either the House or Senate, Herring said.

Another Republican senator, Don Thomas of Dalton, said the GOP doesn't have the votes to approve a constitutional amendment this year.

"We wouldn't have a two-thirds majority," said Thomas, a practicing physician who's chair of the Senate Health and Human Services Committee. "The minority party, a number of them would oppose it and we have some in the majority party that would oppose it, too."

Sen. John J. Wiles, R-Kennesaw, said he plans to try to tackle the court's opinion in next year's session.

"That would be an important thing for us to address," said Wiles, chairman of the Senate Special Judiciary Committee.

House Speaker David E. Ralston, R-Blue Ridge, is "disappointed" by the court's decision and is "evaluating the ruling and [will] make a decision in the next few days on how to proceed," said Ralston's spokesman, Marshall Guest.

Donald J. Palmisano Jr., general counsel of the Medical Association of Georgia, which represents physicians, said that the group is "looking at all of the different legislative options right now" and reading the court's opinion. Palmisano declined to say if he had spoken with individual legislators about filing new legislation or amending existing legislation.

Lawyers seemed to be in agreement that the court's ruling would require a constitutional amendment if the Legislature wanted to try to reverse the court.

"There's no statutory way around this," said Atlanta lawyer J. Marcus "Marc" Howard, who represents plaintiffs in med-mal cases. "It's based on the constitutional right to trial by jury."

Jonathan C. Peters of Atlanta's Peters & Monyak, who argued the defense side at the Supreme Court, agreed with Howard.

"Since the court has ruled that caps are unconstitutional, it would require a change to the Constitution," Peters said. Even if legislation responding to the court were to pass the Senate, it's questionable whether it would be received positively in the House.

During the 2005 debates on SB 3, Rep. Wendell K. Willard, R-Sandy Springs, tried to amend the legislation to raise the cap to \$750,000. Ralston was quoted at the time as saying he supported Willard's amendment.

The House narrowly defeated Willard's amendment after then-Speaker J. Glenn Richardson urged lawmakers to reject it, and after Richardson cast the final vote to break a tie on the amendment.

Now Ralston is house speaker and Willard is both chairman of the House Judiciary Committee and vice chairman of the House Rules Committee, the body that decides what bills are brought to a vote in the full House. Willard could not be reached for comment.

The Legislature probably is too preoccupied with other issues this year to raise the highly controversial issue of changing tort laws, said Danny Orrock, deputy director of Georgia Watch, which opposed the 2005 tort law. The debate surrounding the passage of the 2005 law received intense attention from doctors and lawyers, who filled the halls of the Capitol in 2005 to make their case for or against the bill.

"It seems like the Legislature would want to fix the budget and make some decisions about transportation before they re-open some five-year-old wounds," Orrock said.

The court's decision on caps may be overshadowed by the attention that Georgia leaders are giving to Congress' approval on Sunday of President Barack Obama's health care-reform legislation.

Gov. Sonny Perdue issued a response on Monday condemning Congress' vote on the health care bill. The two Republican candidates for attorney general, Samuel S. Olens and F. Maxwell Wood, also issued statements blasting the congressional vote and calling for Attorney General Thurbert E. Baker to sue to challenge the constitutionality of the vote.

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